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Before the
Federal Communications Commission
Washington, D.C. 20544

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SEP - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
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Implementation of the Cable Television Consumer Protection and Competition Act of 1992 **Review of the Commission's Cable Attribution Rules**	CS Docket No. 98-82
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 **Horizontal Ownership Limits**	MM Docket No. 92-264

CONSOLIDATED REPLY COMMENTS OF MEDIAONE GROUP, INC.

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September 2, 1998

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SUMMARY

The fundamental issue that should govern these proceedings is whether MSO size alone is an impediment to the development of new and independent video programming. Do concerns over size alone, particularly the artificially-enhanced size presumed by out-of-date attribution rules, outweigh the consumer benefits of broadband investments being made by companies like MediaOne? MediaOne submits that control over programming is the foundation of the horizontal ownership rules, and that control should be the focus of reform of the attribution and ownership rules.

The Comments make an empirically grounded, convincing case that not even the largest cable operator disfavors unaffiliated cable networks, pays them lower license fees, or significantly "forecloses" them from the market. As a matter of economics, the risk of subscriber loss to competitors would overwhelm any gain from foreclosing a rival. This is particularly true with respect to "attributed" interests, such as the fractional interest MediaOne took in a Time Warner subsidiary when it was co-venturing in Full Service Networks. The routine double counting of such customers precludes MediaOne from significant expansion by treating it as though it is twice its actual size. The social cost of such a rule cannot be justified under any antitrust or logical analysis.

The voluntary certification and multiplier mechanisms MediaOne has suggested are far more focused tools for protecting programmers from potential monopsony power, and would provide the certainty needed for broadband investments. All of MediaOne's "video" competitors who have participated in this proceeding have confirmed the need to shape the ownership rules to reflect today's market for bundled voice, video, and data services in regional clusters. DirecTV, wireless cable (MMDS) and RCN all see themselves as offering bundles of video, voice, and data services in competition with ILECs, cable, and ISPs.

In contrast, allowing MSO's the scale needed for today's market for video, voice, and data greatly increases facilities-based competition. Our competitors already have their allies, size and scale. RCN has Peter Kiewit Sons' and electric utilities; DirecTV has Hughes; Ameritech has Ameritech — and possibly SBC. These competitors want to retain the advantages they derive from their own scale and size while precluding cable operators like MediaOne from pursuing the business combinations that make the most sense for competition.

Commenters who oppose reform seek only to restrain broadband competition, not to protect the development of independent programmers. Their comments offer only broad generalities, choosing to use this process not for empirical exploration and regulatory reform, but to retard their direct competitors and to address tangential issues which are far better addressed in other proceedings.

MediaOne's Comments have demonstrated that revision to the cable ownership rules will effectuate competition by allowing a level of investment and growth that would not in any way undermine the growth of independent programmers. That is, after all, the original purpose of these ownership rules and why they should be recrafted to minimize their severe but unintended consequences.

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CONSOLIDATED REPLY COMMENTS OF MEDIAONE GROUP, INC.

MediaOne Group, Inc., ("MediaOne") submits these Consolidated Reply Comments in response to initial comments filed in these dockets on August 14, 1998, pursuant to the Commission's *Notice of Proposed Rulemaking* in CS Docket No. 98-82 (released June 26, 1998) ("*Attribution NPRM*") and its *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-264 (released June 26, 1998) ("*Ownership Limits NPRM*").

I. The Fundamental Issue That Should Guide These Proceedings Is Whether MSO Size Alone Is An Impediment to the Development of New and Independent Video Programming.

The rules at issue in these proceedings were created for a market quite different from the broadband market that exists today. The existing 30% cable ownership cap was created in 1993 (when broadcasters were capped at 25% national audience reach[1]), and the cable attribution rules derive from broadcast proceedings that date back for decades. Today, however, the FCC's cable ownership rules cannot realistically be assessed or revised from a "video only" perspective that fails to account for cable's delivery of advanced broadband services. Applied today, the rules hamstring MediaOne's ability to provide advanced services.[2]

The basis for the Commission's limits on horizontal ownership is control over programming, and that control should be the focus of reform of the attribution and ownership rules. Whatever may be done with respect to other rules, for cable horizontal ownership, the heart of the Commission's analysis should be whether MSO size alone harms new and independent programming. There is a panoply of more focused rules to assure diversity: federal laws governing must carry, commercial leased access, and a 40% cap on placing affiliated channels on the analog spectrum, plus local franchise requirements for PEG access channels. Given these assurances that other voices will be heard, the only remaining issue should be whether concerns over monopsony warrant the barriers now in place.

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1 Prior to 1996, Former Section 73.3555(e) of the Commission's Rules set a cap on the number of broadcast television stations in which any entity could have an interest, and also prohibited an entity from having a cognizable interest in television stations with an aggregate national audience reach exceeding 25 percent.

2 MediaOne Comments at 12-19.

MediaOne's Comments, and others,[3] make an empirically grounded, convincing case that the answer is no. A study by Charles River Associates demonstrates that there is no evidence that even the largest cable operator disfavors unaffiliated cable networks, pays them lower license fees, or significantly "forecloses" them from the market.[4] Instead, (as many Comments demonstrate), the number of new and independent programming services is growing and, in many cases, these services are highly successful.[5] The Commission should take note that new and independent programmers — the intended beneficiaries of the ownership limit[6] — have found no reason to comment to date in this proceeding. All evidence suggests that these programmers have flourished, and have not been harmed by the increased concentration in the cable industry.

MediaOne's Comments discussed how the rules treat MediaOne, which serves 4.9 million U.S. cable subscribers, as larger than Time Warner, Inc., which serves 9.6 million

[3] *See, e.g.,* Comments of NCTA in MM Docket 92-264 (August 14, 1998) at 3-13; Comments of Time Warner in MM Docket 92-264 and CS Docket 98-82 (August 14, 1998) at 12-17; Comments of Tele-Communications, Inc. in MM Docket 92-264 (August 14, 1998) at 9-36.

[4] Stanley M. Besen and John R. Woodbury, "An Economic Analysis of the FCC's Cable Ownership Restrictions," August 14, 1998, ("Besen Ownership Analysis") at 18-21 (submitted with Comments of Tele-Communications, Inc., in MM Docket 92-264, (August 14, 1998).

[5] *See, e.g.*, Comments of TimeWarner in MM Docket 92-264 and CS Docket 98-82 (August 14, 1998) at 12-17.

[6] *See, e.g., Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 98-138 (released June 26, 1998) at ¶ 3 (Horizontal ownership rules are designed "to prevent MSOs from exercising market power against new, independent, and less prominent programmers.")

subscribers, through the double counting of customers, solely due to the fractional interest MediaOne took in a Time Warner subsidiary when it was co-venturing in Full Service Networks. Interests giving partial ownership or influence over a cable system cannot be equated with controlling interests. The administrative and social costs for eradicating theoretical "influence" are too high. The current social costs of a broad prophylactic rule cannot be justified under any antitrust measure (Herfindahl-Hirshman Index or civil monopoly standards),[7] nor does it make logical sense. MediaOne's partial interest in Time Warner Entertainment does not give MediaOne a significant incentive to deny access to MediaOne customers by programmers not affiliated with TWE.[8] Indeed, as a matter of fundamental economics, the risk of subscriber loss to competitors would overwhelm any gain from foreclosing such services.[9]

If there is any lingering concern over the programming consequences of increased size, it can be readily addressed through the voluntary certification mechanism MediaOne proposed in its initial comments. The Commission's horizontal ownership rule should not attribute customers if an operator certifies that: (1) the interest is a minority interest, and (2) the entity in which the minority interest is held is not included in, and does

[7] *See, e.g.,* MediaOne Comments at 19-21; Stanley M. Besen, et al., "An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems" August 14, 1998 at 18-30 (antitrust analysis) (submitted with Comments of Tele-Communications, Inc. in CS Docket 92-82, filed August 14, 1998)

[8] MediaOne Comments at 7-10.

[9] Besen Ownership Analysis at 8-11.

not come under, the minority owner's carriage negotiations or agreements. As further assurance, the Commission could provide that neither the MSO with a minority interest nor the prime MSO may coerce any video programming vendor to provide, nor retaliate against such vendor for failing to provide, the programming service to the other company.

The rules should likewise be tailored in other ways to more closely effectuate the purposes of protecting new and independent programmers. Specifically, subscribers reached through ownership interests held through one or more intervening corporations or partnerships should be calculated using the equity percentage as a multiplier, much as corporate ownership interests are now calculated for attribution purposes.[10] No party has presented any argument that warrants retention of the current calculation of customers, which results in inequitable and illogical double counting of many cable subscribers.

Nor is there need to craft an amorphous "influence" test. Indeed, the vague "cross-interest" policy, a "debt plus equity" test, and similar measures have been shown by the Comments to disserve the underlying principles of the cable ownership rules, and would frustrate the certainty needed for investments to be made.[11] Nor is there a need for a

[10] MediaOne Comments at 26-28. The mechanics of these reforms are set forth in the draft Rule submitted with MediaOne's initial Comments.

[11] *See, e.g.*, Comments of NCTA in CS Docket 98-82, (August 14, 1998) at 11-14; Comments of Time Warner, Inc. in MM Docket 92-264 and CS Docket 98-92, (August 14, 1998) at 58-63; Comments of Tele-Communications, Inc. in CS Docket 98-82, (August 14, 1998) at 25-32.

certification broader than that recommended by MediaOne. For example, under the Commission's current rules, a director of a multi-faceted media company was found to be "insulated" and not attributed, although the director was "free to participate in matters ... affecting [the firm] generally, even if such matters may tangentially affect [a specific station]."[12] Likewise, it should not be necessary for an investor to disclaim all participation in financial matters (like budgeting) or operation, or technology, in order to effectively assure that the investor does not control the programming of the other MSO, and thereby threaten the growth of non-affiliated programmers.

II. The Ownership and Attribution Rules Must Reflect Today's Market to Provide Broadband Bundles of Video, Voice, and Data Services

A common deficiency among the Commenters who oppose reform is their exclusive preoccupation with narrow aspects of the video distribution marketplace, with no concern for Congress' mandate that the FCC not stifle the benefits of scale, and with no recognition of the broader services provided by cable operators like MediaOne.[13] Within that narrow "video-only" horizon, there are ample checks on cable's supposed incentives and opportunities to suppress diversity. The focus of *these* proceedings should be to answer the

[12] *Turner Broadcasting System*, 11 FCC Rcd 19595 at n. 63 (October 9, 1996).

[13] As the Commission recognizes, Section 613(f)(2) requires the Commission to balance seven public interest objectives in these rules, including that the rules "take into account any efficiencies and other benefits that might be gained through increased ownership or control," that they "reflect the dynamic nature of the communications marketplace," and that they do not "impair the development of diverse and high quality programming." 47 U.S.C. § 533(f)(2).

question: do concerns over size alone, particularly the artificially-enhanced size presumed by out-of-date attribution rules, outweigh the consumer benefits of broadband investments being made by companies like MediaOne?

MediaOne's Comments explained the importance of scale in the delivery of facilities-based competition in telephone and data, giving examples of our preliminary efforts to offer telephone and high speed data service in our most highly clustered markets. We further explained that, in order to compete with ILECs several times larger than MediaOne by any measure, the rules need to be revised to allow our systems to continue to grow, and to allow our regions to strengthen their clusters.

All of MediaOne's "video" competitors who have participated in this proceeding see themselves as offering a bundle of voice, video, and data services. DirecTV offers Direct PC a high-speed Internet connection designed to rival cable modem Internet access services like MediaOne's MediaOne Express. Providers of wireless cable (MMDS) have re-invented that service as a platform for broadband delivery of data, after a few years of experience taught that the business of wireless video, without more, would not sustain investor interest.[14] RCN's highly-touted business strategy is to offer a bundle of video, voice,

[14] As part of this effort, "over one hundred participants in the wireless cable industry" have convinced the Commission to revise its rules to enhance the ability of MDS and ITFS licensees to provide two-way communications services, including high speed digital Internet access. *See Amendments to Parts 1, 21, and 74 to*

and data services in competition with ILECs, cable, and ISPs, as it has explained to investors and to franchising authorities.[15]

From this broadband perspective, it is instructive to review Consumer Federation of America's complaint that size and clustering reduces the potential for video overbuilding.

Video choice is already ubiquitous nationwide. The FCC, NTIA, and independent studies have all concluded that the presence of DBS does act as a price constraint on cable.[16] Indeed, this may well account for the results of the Commission's last published price survey, which finds that the modest rate differential between "competitive" and "non-competitive" cable systems is declining.[17] Rate increases imposed by all types of cable systems (*i.e.*, competitive, non-competitive, regulated, and unregulated) are largely limited to

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Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 12 FCC Rcd. 22174 (1997).

[15] *See, e.g.* RCN Annual Report 1997 at 1 ("From Boston to Washington, RCN today is the only competitive telecommunications provider capable of delivering a full range of voice, video and data services to the residential market."); RCN has devoted a page of its website to "Bundling" of services, in which it claims that "RCN is the first provider to offer Internet access, local and long distance phone, and cable television." (www.rcn.com/services/bundling).

[16] See, e.g., Comments of the National Cable Television Association in CS Docket 98-102, (July 31, 1998) at 12 - 23. NCTA discusses a study by the Yankee Group concluding that the majority of DBS subscribers have access to cable television, and a study by Strategis Group which found that "just 4% of cable subscribers who weren't interested in DBS blamed lack of local programming."

[17] Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report Cable Industry Prices, FCC 97-409, MM Docket 92-266 (released Dec. 15, 1997).

inflation, programming costs, channel additions, system upgrades, and equipment provided at cost.[18] These increases are not symptomatic of an industry unchecked by competitive limits.

Scale is essential for investors like MediaOne to offer facilities-based competition in telephony and data.[19] This point is at the heart of MediaOne's initial comments. The Commission has recognized the benefits which MSO growth has for competition with ILECs. MediaOne's experience in Boston, Chicago, Atlanta, Jacksonville, South Florida, Detroit and Los Angeles is living proof of the point. In facilities-based competition, size matters. Our largest region (Northeast) is dwarfed by the incumbent LEC's customer base and revenues, yet MediaOne is the party constrained by artificial ownership caps.[20] Our competitors have already found the industry combination to achieve that size and scale. RCN has Peter Kiewit Sons' financial backing and that of incumbent utilities (Boston Edison and PEPCO).[21] DirecTV is backed by Hughes Electronics. Ameritech has Ameritech — and possibly SBC, both companies of ample size. These competitors want to retain the advantages which come from their own scale and size, and preclude independent cable operators like MediaOne from achieving the same. That is absolutely contrary to

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18 *Id.*

19 MediaOne Comments at 12-19.

20 MediaOne Comments at 18.

21 *See, e.g.*, RCN Annual Report 1997 at 33-35 (Sec. 6, "Business Combinations" and Sec. 7 "Investment and Joint Ventures"); Darnie Roth, "RCN's High Wire Act," Forbes magazine article (reprinted at RCN's website, www. rcn.com/investor/news/12.29.97.html).

Commission goals. As Chairman Kennard recently expressed, "I don't care who wins the race to bring high capacity broadband services to America's homes. Whether it's ILECs, or CLECs, broadcasters, cablecasters, or satellite providers, my goals are simple: get this capacity into America's homes, get it there as quickly as possible, and make sure that every competitor has an opportunity to compete on a level field in getting it there."[22]

III. Commenters Opposing Reform of the Attribution and Ownership Rules Seek Only To Restrain Broadband Competition, Not to Protect the Development of Independent Programmers.

From this broadband perspective, the goals of those who oppose regulatory reform become obvious. Their comments offer only broad generalities, choosing to use this process not for empirical exploration and regulatory reform, but to retard their direct competitors and to address tangential issues which are far better addressed in other proceedings.

For example, RCN argues that size alone should be regarded as a problem, without providing any economic evidence.[23] It advocates that the Commission should halt

[22] Remarks by Chairman Kennard to the National Ass'n of Regulatory Commissioners, (July 27, 1998).

[23] Comments of RCN Telecom Services, Inc. in MM Docket 92-264 and in CS Docket No. 98-82 (August 14, 1998).

cable clustering, using a rationale which was specifically rejected by the Commission in 1993.[24] Speaking from the other side of its mouth when playing to other audiences, RCN itself identifies clustering (from Boston to Washington D.C. and from San Francisco to San Diego) as its principal business strategy.[25] One might fairly read RCN's comments as an effort to promote rules which leave RCN as the sole integrated provider of video, voice and data in clustered markets.

For its part, Ameritech argues that no changes should be made in any of these rules until program access rules have been reformed to Ameritech's liking.[26] While it is no surprise that Ameritech seeks to import program access into yet one more proceeding, it offers no reason why this proceeding should be held hostage to the outcome of reforms it has proposed to Congress, nor why the Commission's reasoned program-access reforms, just issued at the request of Ameritech, are insufficient to address its needs.

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[24] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, 8 FCC Rcd. 8565 ¶¶ 16-17 (1993)("We believe that the potential benefits and efficiencies of regional concentration outweigh any anti-competitive affects in the local programming or advertising marketplace. In fact, the record suggests that cable operators do not possess undue power in the local programming or advertising markets.. . ")

[25] RCN claims it will "compete for 40% of the nation's telecommunications market by building in only 6% of its geography." www.rcn.com/investor/press (August 11, 1998). The company's 1997 annual report confirms its clustering strategy: "Density increases the potential revenue that can be derived from every fiber-mile constructed and . . . forms the paradigm for RCN's success. . . . It's all about density." RCN annual Report 1997 at 7.

[26] Comments of Ameritech New Media in MM Docket 92-264, filed August 14, 1998.

Likewise, DirecTV and The Wireless Communications Association seek to use this proceeding to address very specific program access concerns, such as whether MSNBC should be converted into a vertically integrated cable network for program access purposes,[27] a matter which is ordinarily dealt with by complaint. Program access under Section 628 and carriage complaints under Section 616 are the most straightforward vehicles for resolving concerns these competitors may have. Like Ameritech and RCN, these commenters offer no reason why the Commission should use the horizontal ownership rules to duplicate the program access rules, instead of to protect the growth of new programming sources as Congress intended.

The Consumer Federation of America is essentially fighting a broadcast battle on cable turf. MediaOne understands the concerns which CFA has over local management agreements (LMAs) — concerns CFA has fully explained in the parallel broadcast proceedings. But the cable television industry is not broadcasting. Unlike broadcasters, cable operators *expand* the avenues open to unaffiliated programmers through numerous legal requirements; "must carry" and commercial leased access requirements of federal law, plus public, educational, and governmental (PEG) access channels required by local franchises.[28]

[27] Comments of Wireless Communications Association in CS Docket 98-92 (August 14, 1998) at i, 4, 9-15; Comments of DirecTV in CS Docket 98-82, (August 14, 1998) (comments devoted to program access rules).

[28] As explained in MediaOne's Consolidated Comments, these requirements open up to 60% of MediaOne's video channel capacity to unaffiliated third parties. MediaOne Comments at 8.

Unlike an LMA between direct broadcast competitors in a local market, joint ventures or mergers which consolidate management in a cable region do nothing to constrain such diverse voices, but do expand the opportunities for facilities based competition with other broadband providers. This is one of the many distinctions between cable and broadcasting which the attribution and ownership rules should serve, but which CFA fails to consider.

In contrast, MediaOne and others who must live with the consequences of the current attribution and horizontal ownership rules have submitted convincing, detailed, factual evidence that the current rules are out of date and create unintended but severe barriers to investment. Those opposing reform are either deliberately or unwittingly seeking to constrain the very investment which will bring widespread facilities-based broadband competition to the nation. MediaOne's Comments have demonstrated that revision to the cable ownership rules will effectuate competition by allowing a level of investment and growth that would not in any way undermine the growth of independent programmers. That is, after all, the original purpose of these ownership rules and why they should be recrafted to minimize their severe but unintended consequences.

IV. Conclusion

For the foregoing reasons, MediaOne respectfully asks the Commission to incorporate modifications to the cable ownership limits and the cable attribution rules as detailed in its Comments.

Respectfully submitted,

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September 3, 1998